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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 788

PAUL GINSBURG, Petitioner,

v.

JOHN D. BLACK, JOHN C. SLADE, GUY ALLEN GLADSON, EDWARD G. INCE, BRYCE L. HAMILTON, REUBEN A. BORSCH, DOUGLAS C. MOIR, JAMES D. HEAD, GERARD E. GRASHORN, GEORGE W. OTT, GRIER D. PATTERSON, WALTER A. WADE, PAUL H. MOORE, CHARLES J. CALDERINI, GEORGE B. CHRISTENSEN, THOMAS I. UNDERWOOD, THOMAS A. REYNOLLS, FRANK B. GILMER, ROBERT McDOUGAL, JR., ALBERT W. POTTS and WILLIAM C. MULLIGAN, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Paul Ginsburg respectfully prays that a writ of certiorari issue in the above captioned case to review the judgments of the United States Court of Appeals for the Seventh Circuit rendered therein November 1, 1956 (App. 9); Petition for Rehearing denied November 26, 1956.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is not reported but appears in the Record (R. 111-112). The opinion of the United States Court of Appeals for the Seventh Circuit is reported in 237 F.2d 790, and is appended hereto (App. 1-9).

JURISDICTION

The jurisdiction of this Honorable Court is invoked under Section 1254 of the Judicial Code.

The court of appeals denied Petition for Rehearing, without opinion, on November 26, 1956. Therefore, time within which this petition for writ of certiorari might be filed expires on February 24, 1957.

QUESTIONS PRESENTED

1. Are grievance proceedings in the American Bar Association absolutely privileged, licensing respondents falsely, maliciously and wilfully to publish written defamatory matters therein, in their very nature libelous per se concerning the lawyer complainant, without incurring liability in a libel action?

2. On appeal from Summary Judgment for defendants in a libel action on the ground of absolute privilege only, does the court of appeals have the jurisdiction or right to affirm the district court on a different ground only, viz., the absence of the essential ingredient of publication, particularly when publication was admitted?

3. Is it not error to grant a motion for summary judgment where there are genuine issues as to material

facts, and should not all doubts as to the existence of such issues be resolved against the moving party?

4. Is it not error for the Courts to refuse to grant plaintiff's motions to strike pleadings which are admittedly untrue, unprovable, forthwith denied and libelous per se as to the lawyer plaintiff, particularly when the granting thereof would render the defendants defenseless; and does not such erroneous action deprive plaintiff of rights guaranteed by the Constitution and laws of the United States?

5. Does not a member of the bar have a duty as well as a right to prosecute well founded grievance proceedings against other members of the bar in a proper forum such as the American Bar Association, assuming that they all are members of that voluntary association; and does not such complainant lawyer have an interest in the outcome of such proceeding?

STATEMENT

Petitioner is an attorney at law and a member of the bar of this Honorable Court, and of the Supreme Court of Pennsylvania and other courts, and of various bar associations, including the American Bar Association (R. 4).

Respondents are attorneys at law and members of the bar of various courts, and bar associations, including the American Bar Association (R. 4, 10).

Petitioner lodged a complaint dated July 8, 1952, with the Committee on Professional Ethics and Grievances of the American Bar Association against the respondents (R. 16-19). The grievance complaint showed, inter alia, that while there was pending in a Kentucky court proceeding the matter of the sale of 85% of the stock of American Creosoting Company and subsidiaries for $3,800,000.00 from the Estate of Sallie A. Hert, Deceased, to Alfred L. Kuehn, a co-trustee of said Trust Estate (through a corporation formed by Kuehn and his sons), petitioner herein moved the court for leave to intervene as *amicus curiae,* to defer the sale and permit prospective purchasers to inspect the properties, etc. While at the outset petitioner's client was willing to bid only about 20% more than the price which the co-trustee was offering, the price was only roughly the value of the net assets of the corporation aside from the plants and equipment for which petitioner had an informal appraisal of at least $16,900,000.00, with replacement cost of $30,000,000.00. When these facts with respect to the value of the assets being purchased by their client were threatened with exposure, these re-

spondent attorneys launched a personal attack upon petitioner falsely and maliciously describing him as an "interloper" and asserting that he was attempting to get in a position where he might "hope to be bought off", which attack caused denial of his petition. ***Petitioner's libel action based on these words was dismissed on motion for being absolutely privileged.*** Being left without any remedy for the false and malicious statements impugning petitioner's integrity and damaging him in his reputation and good name, petitioner filed said grievance complaint charging respondents acted in a shockingly unprofessional way and in violation of the Canons of Professional Ethics, particularly Canon 17. Petitioner, on the contrary, had acted honorably and in accord with Canon 41 with respect to calling to the attention of the court a possible fraud or deception upon it. The respondents succeeded in having the court approve the sale to their client without investigation of the facts underlying the petition, following their attack upon petitioner and his motives. Finally the complaint charged that the personal attack upon petitioner was compounded by the imposition upon the court of the sale they were supporting and that the conduct of these respondent attorneys in that connection and the question of their fraud or imposition upon the court in connection with the sale was worthy of investigation (R. 16-19).

In the course of said grievance proceeding, the respondents not only repeated the said false, malicious and libelous matters concerning petitioner, but also continuously published more and more of such false, malicious and libelous matters. On or about June 15, 1953,

in a "memorandum" in opposition to appeal of petitioner from the refusal of the Committee on Professional Ethics and Grievances to entertain the complaint, and on or about July 15, 1953, in a "Response to Motion to Strike Memoranda and to Delete and Suppress Certain Matter", the respondents maliciously and falsely did, by themselves, their attorneys, agents and employees cause to be filed and published in several states throughout the United States and widely publicized throughout the legal profession, the most defamatory, libelous per se matters concerning petitioner (R. 5-6), (App. 2-3), by reason of which petitioner brought this action for libel in the United States District Court for the Northern District of Illinois, E. D., based on diversity of citizenship (R. 4).

The 6th allegation of plaintiff's Complaint (R. 5) which defendants denied in their Answer (R. 8), is as follows:

> In addition to being a practicing lawyer of repute and good standing as aforesaid, plaintiff has at all times been a law abiding citizen and has enjoyed a high and excellent reputation in the profession and in his business, social and community relationships; he has at no time committed any crime, nor has he been guilty of any professional misconduct, and particularly the filing of petitions, pleadings and court papers containing "half truths and plain falsehoods of the type usually filed by persons only interested in making trouble in the hope of personal gain"; nor has plaintiff at any time attempted "to get himself into a position where he might hope to be bought off" as an "interloper" or

an "intermeddler" in litigation "in which he had no slightest interest" (R. 5).

In view of defendants' denial of the 6th allegation, plaintiff filed a Motion Under Rule 34 to require the defendants to produce *inter alia* all records, documents, memoranda and correspondence, if any, relating to the several averments of the 6th allegation, and relating in any way whatever to the plaintiff personally and professionally. In the defendants' Answer to the Motion Under Rule 34 they alleged that they do not have in their possession, custody or control any record, documents, memoranda or correspondence of the type they believe referred to in plaintiff's Motion, or which may constitute or contain evidence relevant and material to the 6th allegation of the Complaint. Plaintiff's Motion Under Rule 34 and defendants' answer thereto are quoted (R. 107-108) in Plaintiff's Motion To Strike Under Rules 11 and 12 (f) And to Postpone Consideration of Defendants' Motion for Summary Judgment (R. 107-109) to have the court strike from defendants' Answer the 6th allegation thereof as sham, false and scandalous, which motion was ignored.

It will be quite evident to the Court from the foregoing that all of the allegations of the petitioner's complaint (R. 4) are true and state a cause of action, regardless of Notice Pleadings; and further that the respondents have no defense thereto, but nevertheless persist in repeated attacks upon the petitioner with assertions that are *admittedly* false, malicious and libelous. ***Their answer to Motion Under Rule 34 admits the falsity and malice as above stated; because it discloses their inability to produce.***

Plaintiff's Motion Under Rules 11 and 12 (f) To Strike Defendants' Motion For Summary Judgment And Defendants' Brief In Support of Motion For Summary Judgment, as being sham, frivolous, impertinent, incompetent, irrelevant, immaterial and scandalous (R. 111) *was refused* (R. 118).

Judge Philip L. Sullivan on July 1, 1955, entered a Judgment Order (R. 113) granting defendants' Motion For Summary Judgment on the ground of absolute privilege. The Court of Appeals affirmed the judgment, but upon different grounds, viz., the lack of the essential ingredient in libel of publication, in spite of defendants' admissions in their Answer (R. 12) that they mailed said memorandum "to the Chairman of the said Committee on Hearings of the American Bar Association at Brattleboro, Vermont"; and that they filed said Response "with the Chairman of the Committee on Hearings at Brattleboro, Vermont". The record shows that publication at Brattleboro, Vermont, is a fact established by the pleadings (R. 12); and publication at Chicago and elsewhere throughout the United States is an issue raised by the pleadings (R. 12).

Following the said affirmance, petitioner filed a Petition for Rehearing (of record herein); respondents filed an Answer to Petition for Rehearing (of record herein), which did not deny any of the allegations of the petition. Nevertheless rehearing was denied.

REASONS FOR GRANTING THE WRIT

1. Libelous matters published by respondents in the course of grievance proceedings in the American Bar Association are not absolutely privileged, especially when they are impertinent and irrelevant, as well as admittedly false, unprovable and libelous *per se* as to the lawyer complainant. Under the applicable law, such defamatory matter would not be absolutely privileged even in Court pleadings[1]. *A fortiori,* such defamatory matter would not be absolutely privileged when published in a voluntary association. Nevertheless District Judge Philip L. Sullivan granted defendants' motion for Summary Judgment (R. 113) on the ground of absolute privilege without any legal authority whatever, to support it. However, Circuit Judge Schnackenberg apparently impressed by petitioner's argument, saw the dangers in affirming such an untenable and insup-

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[1] In the leading historic case on the subject, *White v. Nicholls,* 44 U.S. 266, 11 L. Ed. 591:

> "Malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribunal or authority,—and—proof of express malice in any written publication, petition or proceeding, addressed to such tribunal, will render that publication, petition or proceeding libelous in its character and actionable, and will subject the author and publisher thereof to all the consequences of libel."

Judge Taft in *Post Publ. Co. v. Hallam,* 59 Fed. 530 observed that:

> "The existence and extent of privilege in communications are determined by balancing the needs and good of society against the right of an individual to enjoy a good reputation when he has done nothing which ought to injure it. The privilege should always cease where the sacrifice of the individual right becomes so great that the public good to be derived from it is out-weighted."

portable misapplication of the law and declined to do so. Petitioner's said argument is quoted in paragraph 2 of his Petition for Rehearing, and manifests the dangers to Judge Schnackenberg and his associates, as well as to the respondents and other members of the bench and bar. Therefore, the defense of absolute privilege in such proceedings seems to be rejected and denounced beyond reapplication. To sustain this point would prevent a departure from the accepted and usual course of judicial proceedings, and bar the Court of Appeal's sanctioning thereof by the district court, as to call for an exercise of this Court's power of supervision.

2. The Court of Appeals did not have the power or right to affirm the judgment of the district court on any ground. In its Opinion (App. 5), the Court of Appeals stated, "Defendants thereafter made a motion for summary judgment in their favor, which was granted by the district court. Plaintiff's appeal followed. We shall affirm the judgment below. We base our action upon grounds different from those relied upon by the district court. This we have a right to do. *Kithcart v. Metropolitan Life Ins. Co.*, 150 F. 2d 997, 1000; *Securities Comm'n v. Chenery Corp.*, 318 U. S. 80, 88." The Court of Appeals had not only a right but also a duty to reverse by rejection the grounds of absolute privilege. But it had no right whatever to affirm on the grounds that the libelous matters complained of were not published by the respondents. The two cases cited in support of that "right" by the Court of Appeals are not authority for it herein. The opinions in those two cases reveal an important legal restriction on that right not disclosed by Circuit Judge Schnackenberg.

The Kithcart case (p. 1001), citing the Securities Commission case, holds that "An appellate court may, when necessary or desirable, sustain a correct judgment on a different ground than that adopted by the trial court, *where such a ground is one that is within its power to formulate*" (Italics supplied). In the Securities Commission case (p. 88) Mr. Justice Frankfurter stated, "In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct although the lower court relied upon a wrong ground or gave a wrong reason. *Helvering v. Gowan*, 302 U. S. 238, 245. The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury".

Therefore, the different ground must be "within the power of the appellate court to formulate". It is not within the power of the appellate court to formulate when the decision "depends upon a determination of fact which only a jury could make but which has not been made" because "the appellate court cannot take the place of the jury". In the instant case, in appropriating the said right, the Court of Appeals not only

usurped the function of a trial jury, but also took the place of the defendants with a *nunc pro tunc* power to withdraw their admission of publication. When petitioner argued in the Court of Appeals that "The defendants' admissions in the record leave the court no alternative but to set the case for trial by jury", he pointed out that in his brief in opposition to motion for summary judgment (and repeated in paragraph 3 of his Petition for Rehearing which was answered but not denied) the first fact established by the pleadings is, "Publication of all the libelous matters complained of at least at Brattleboro, Vermont (R. 12)"; and the first issue raised by the pleadings is, "Publication of the libelous matters at Chicago and elsewhere throughout the United States. Denied. (R. 12)", which jury issue was usurped by the Court of Appeals.

Petitioner respectfully submits that the surprise Opinion of the Court of Appeals seems so incredibly ill-founded, for all the torturing of the record which was required to "support" it, that he is impelled to argue that although judges have a right to be wrong, they have a concomitant duty to be sincere. The foregoing reason for granting the writ is concluded by urging that in sustaining it, a conflict will be avoided with the decision, *supra,* of the other Court of Appeals, and with the decision, *supra,* of this Honorable Court.

3. The motion for summary judgment (R. 37-99) is preposterous beyond description; an insult to the intelligence of any unbiased Court, and a patent violation of Rule 11 as well as Rule 56 of the Federal Rules of Civil Procedure. See Affidavit In Opposition To Defendants' Motion For Summary Judgment (R. 100-103)

and Additional Affidavit In Opposition To Defendants' Motion For Summary Judgment (R. 105); also, *Preveden v. Croatian Fraternal Union of America,* 120 F. Supp. 33, 35, (D.C., W.D. Pa. 1954). Furthermore, the respondents admitted in their Answer to Motion Under Rule 34 (R. 108) that they have no proof whatever to support their false, reckless, scandalous charges which are libelous per se as to petitioner. They admit even in their motion for summary judgment that there are numerous facts in the Complaint which are established by the pleadings as well as several issues raised by the pleadings; yet their motion is made "on the ground that there is no genuine issue as to any material fact in this action" (R. 37).

The following authorities indicate further how repugnant to Rule 56 is defendants' Motion for Summary Judgment. In considering motion for summary judgment, the pleadings upon which motion is based are to be liberally construed in favor of party opposing the motion. *Purity Cheese Co. v. Frank Ryser Co.,* C.C.A. Wis. 1946, 1953 F.2d 88. Court would view the allegations in complaint in light most favorable to plaintiff, and the truth of all facts well pleaded, in passing on motion by defendant for judgment. Rule 56 was not intended to deprive litigants of a right to full hearing on merits if any issue of fact exists and was not intended to be used as a substitute for regular trial where outcome of litigation depends upon disputed questions of fact. *Michel v. Meier,* D.C. Pa. 1948, 8 F.R.D. 464. Under subdivision (c) of this rule providing that summary judgment shall be rendered if "pleadings" show there is no genuine issue as to any material fact, quoted word includes complaint. *Reynolds Metals Co v. Metals*

Disintegrating Co., D.C.N.J. 1948, 8 F.R.D. 349, affirmed 176 F.2d 90. Summary judgment under Rule 56 should not be rendered where there is a genuine dispute of fact on material issues; and summary judgments should be cautiously invoked to the end that parties may always be afforded a trial where there is a *bona fide* dispute of facts between them. *Associated Press v. United States,* 326 U.S. 1, 64S. Ct. 1416. This rule, authorizing summary judgment, was not designed to foreclose plaintiff's privilege of examining defendant at a trial, especially as to matters peculiarly within defendant's knowledge. *Arnstein v. Porter,* C.C.A. N.Y. 1946, 154 F.2d 464. Rule 56 was never intended to throw upon the court the burden of determining a case involving a delicate question of law and complicated and controverted facts without an adequate and proper hearing. *Lincoln Electric Co. v. Knox,* D.C.D.C. 1944, 56 F.Supp. 308. The court's function on motion for summary judgment is solely to determine whether there is a genuine issue; summary judgment may not be entered. *Norton v. Shotmeyer,* D.C. N.J. 1947, 72 F. Supp. 188. Under Rule 56, authorizing court to enter summary judgment, court's function is not to decide factual issues, but to determine whether there is an issue of fact to be tried, and all doubts as to existence of such issues are to be resolved against the moving party. *American Optical Co. v. New Jersey Optical Co.,* D.C. Mass. 1944, 58 F. Supp. 601. See, also *Hawkins v. Frick-Reid Supply Corp.,* C.C.A. Tex. 1946, 154 F. 2d 88. Summary judgment may not be granted under this rule if there be an issue presented as to existence of any material fact, and all doubts as to existence of a genuine issue as to a material fact must be resolved against party moving for summary judgment.

Sarnoff v. Ciaglin, C.C.A. N.J. 1947, 165 F.2d 167. Rule 56 should be temperately and cautiously used lest abuse reap nullification. *Avrick v. Rockmont Envelope Co.,* C.C.A. Colo. 1946, 155 F.2d 568.

In view of the foregoing, the granting of summary judgment herein conflicts with decisions in other circuits as well as those of this Honorable Court.

4. The refusal to grant the petitioner's motion under Rules 11 and 12 (f) to strike from defendants' Answer the 6th allegation thereof (R. 107), was an arbitrary, discriminatory and unlawful denial of petitioner's rights in and protection of the Federal Rules of Civil Procedure. In the averments of said motion to strike there are quoted the 6th allegation of the Complaint, the 6th allegation of the Answer, the Motion Under Rule 34 and Answer thereto, Rules 11 and 12 (f), and the conclusion from the record that said 6th allegation of the Answer is sham, false and scandalous (R. 107-109). Likewise, the refusal to grant the motion under Rules 11 and 12 (f) to strike defendants' motion for summary judgment was arbitrary, discriminatory and unlawful. The granting of either of said motions would have rendered the defendants defenseless. Furthermore, the refusal to cleanse the record by striking of the false, malicious, scandalous and libelous per se matters concerning this lawyer petitioner deprives him of rights guaranteed by the Constitution and laws of the United States. Petitioner admittedly has been damaged thereby personally and professionally. One of the facts established by the pleadings is the 1st allegation (R. 4) admitted (R. 8), "Jurisdiction is based upon diversity of citizenship and an amount in excess of $500,000.00."

Reasons for Granting the Writ.

The Fifth and Fourteenth Amendments of the United States Constitution provide that no person shall be deprived of property without due process of law. An essential element of "due process of law" is an opportunity to be heard before reaching a judgment. *Wilson, Inc. v. F.C.C.*, 1948, 170 F. 2d 793, 83 U.S. App. D.C. 176. The right of a litigant to a trial in accordance with the forms of law and with an opportunity to present his claim or defense, if he desires to do so, is a vital part of due process. *Ackerman v. U.S.*, C. A. Tex. 1949, 178 F.2d 983, opinion followed in 179 F.2d 236, judgment affirmed 71 S. Ct. 209, 340 U.S. 193, 95 L.Ed. 207. Due process of law extends to every case which may deprive a citizen of property; and requires an orderly proceeding adapted to the nature of the case and in accordance with the law, in which a person has an opportunity before the taking of property to be heard, and to defend, protect and enforce his rights. *Sorensen v. Jacobson,* 1951, 232 P.2d 332, 125 Mont. 148, 26 A.L.R. 2d 1186. The right to work is one of the most precious liberties that man possesses and is a fundamental human right which is protected from improper infringement. *Hanson v. Union Pac. R. Co.*, Neb. 1955, 71 N.W. 2d 526. The right to earn a living, and the right to a day in court to protect said right are both guaranteed by the Constitution. A person's business, profession or occupation is "property" within constitutional provisions as to due process of law. *Lasdon v. Hallihan,* 1941, 36 N.E. 2d 227, 377 Ill. 187. The right to earn a livelihood is a "property right" which is guaranteed by the Fifth and Fourteenth Amendments. *Carroll v. Local No. 269 I.B.E.W.*, 1943, 31 A.2d 223, 133 N.J. Eq. 144. In the instance case, the decisions of the court below have denied the plaintiff of due process by

discriminatorily refusing to enforce Rules 11 and 12(f) pursuant to which plaintiff's motions to strike should have been granted; and by discriminatorily granting a summary judgment which effected a wrongful denial of plaintiff's right to a trial by jury; resulting in the wrongful taking of his proprietary, personal, constitutional and legal rights, including his property right in the practice of law and the performance of his duties as an officer of the court, his right to his good name, fame and reputation.

In the case of *Quentin Reynolds v. Westbrook Pegler, The Hearst Corporation and Hearst Consolidated Publications, Inc.*, 223 F.2d 429, the U.S. Court of Appeals for the Second Circuit in Appeal No. 23329 last year sustained a jury verdict for the plaintiff in the sum of $175,000.00. The plaintiff therein could not, and did not suffer the excessive damages suffered by the plaintiff herein. Nor was his right to a jury trial as patent and positive as herein. The claim of the defendants therein to a defense of privilege was unfounded, but not nearly as preposterous as the "defense" herein. Some interesting authorities were argued in that appeal, which are applicable herein, including the landmark case of *Corrigan v. Bobbs-Merrill Co.*, 228 N.Y. 58, wherein Judge Pound stated at page 67: "Indifference as to the rights of others, such as might be found from the fact of publishing scurrilous comment without reasonable investigation, is the equivalent of the intentional violation of such rights". In *Lubliner v. Reinlib*, 62 N.Y.S. 2d 212, at 213, the court recognized that the privilege of reply was untenable where the publication is "a counter attack unrelated to the charge . . . and beyond the bounds of defense or reply". Also argued therein as elementary

law is the following: "The libel law has never been confined to charges of illegality or law-breaking. Any false accusation which dishonors or discredits a man in the estimate of the public or his friends and acquaintances or has a reasonable tendency so to do is libelous" (*Bennett v. Commercial Advertiser Association,* 230 N.Y. 125, 127; also *Taylor v. Friedman,* 214 App. Div. 198, 1st Dept.; *Naegele v. McFadden Publications, Inc.,* 161 Misc. 684). Therefore, the decisions of the court below in the instant case in effect degrade the members of the legal profession into an inferior status of persons shorn of constitutional safeguards which are zealously protected even in the cases of common criminals.

In support of his contention of discrimination, petitioner submits that the case of *Paul Ginsburg v. Horace Stern, et al.,* 225 F. 2d 245, a suit brought under the authority of the Civil Rights Acts now embodied in 42 U.S.C.A. Sections 1983, 1985 and 1986 (1954 Supp.), the United States Court of Appeals for the Third Circuit at No. 11,499 (App. 10-11) granted (without opinion) on January 4, 1955, appellees' motion to impound certain original documents in the record for being scandalous. In that case the allegedly scandalous matters which were the subject of said motion were pertinent and presumptively as well as assertedly true, there being no denial thereof in the record. In the instant case, the matters which are the subject of plaintiff's motions to strike are admittedly untrue, unprovable, forthwith denied and libelous per se. Yet the plaintiff's motions to strike those matters for being, *inter alia,* scandalous were ignored or refused (R. 118). Thus the court's negative action bolsters the scurrilous and defamatory charges and leaves the already injured plaintiff with

greater hurt by reason of his having sought "justice under the law".

5. Petitioner had a duty as well as a right to prosecute the within grievance proceeding, and he had an interest in the outcome thereof. The respondents had violated the Canons of Professional Ethics, particularly Canon 17 (R. 18). The petitioner was proceeding in accord with Canon 41 with respect to calling to the attention of the court in Kentucky a possible fraud or deception imposed upon the court (R. 18). The complaint (R. 16-19) is well founded and makes it evident that the respondents' attack upon petitioner both personally and professionally was unethical. Further the record herein shows that at every opportunity the respondents repeated their attacks without justification.

In *People ex rel. Colorado Bar Ass'n. v. Class,* 201 P. 883, 70 Colo. 331, (1921) the Court held, p. 884:

> "It is the privilege, if not the duty, of every attorney to call to the attention of this Court any act of a licensed attorney which may fairly be considered to disqualify him. Calling attention to breaches of professional duty should be encouraged, rather than denounced, and it is only by the exercise of constant vigilance on the part of the members of the bar that the profession may be kept up to that high standard which should characterize it."

In *State ex rel. Fletcher v. Hunter et al.,* 276 S.W. 639, 152 Tenn. 233 (1925), the Court held, p. 640:

> "Each individual member of any local bar, in the same sense as any group of members of a bar acting as a committee, or association, is 'aggrieved'

by the professional misconduct of any other member of his bar. Such misconduct reflects upon and shadows the standing of the bar and profession as a whole, and impairs the standing and usefulness of the profession and of all its members. These are matters in the realm of ethics, and hard and fast rules applicable to tangible rights and wrongs do not apply. One may be 'aggrieved' in the sense contemplated by this statute without having suffered a direct individual injury. It is sufficient that he is a member of a class in this case a profession, whose standing before the public, which should be zealously guarded, has been adversely affected, and which has been, therefore, 'aggrieved'."

Henry S. Drinker, Esquire, Chairman of the ABA Committee on Professional Ethics and Grievances published "Legal Ethics" in 1952 wherein he cites the case of *In Re Adriaans,* 17 Appeal Cases D.C. 39 (1900). In that case U. S. District Attorney Davis filed an information against John H. Adriaans praying that Adriaans be disbarred, and his name be stricken from the roll of attorneys and counsellors; for alleged misconduct that shows him to be unfit to remain a member of the bar. Davis had prosecuted Adriaans for malicious trespass and he was convicted. Adriaans then filed a paper purporting to be a motion in arrest of judgment. This paper was stricken from the files of the Court as being scandalous and libelous. In that paper he charged that the U. S. Attorney had no right or title to that office, and was particularly disqualified from acting in the prosecution because of his having been for years the attorney for the real prosecuting witness, and that he was selling the power of his office in working out a judg-

ment obtained against him by the prosecuting witness. It was held that in a disbarment proceeding for alleged false and scandalous statements concerning a fellow member of the bar and contained in a paper filed in a cause, it is no defense that such statements did not constitute a technical or indictable crime, nor does the question of privilege arise. The only question to be determined in such a proceeding is as to the fitness of the respondent to remain a member of the bar. At page 46 the Court stated: "There being no sufficient reason shown for such rehearing, the motion is overruled; and because the matter stated in the application for rehearing is wholly irrelevant, and is manifestly intended as simply retaliatory, and as means of disparaging the personal character of a member of the Bar, that statement is hereby ordered to be stricken from the files of this Court". At page 47, the Court continued: "Nor is there any privilege for the matter complained of, to which the respondent is entitled as an answer to the present information. Whether there has been a crime committed or not, in the charges made by the respondent, is not the question presented on this information; nor does the question of privilege arise. The Court cannot be precluded the right, by the suggestion of any such defenses, to determine the question whether the respondent be a fit and proper person to remain a member of the bar of this Court. That is the question to be determined here, and it does not depend upon any such defenses as those set up by the respondent in his answer. This is settled by clear and undoubted authority. (*Ex Parte Wall,* 107 U.S. 265; *In re Weare,* 2 Q. B. 439 for 1893; *Rogers v. Green,* 9 Cal. 506; *In re Philbrook,* 105 Cal. 71".).

The Court further held that an attorney is "without warrant in an attempt to make the records of the courts, from the lowest to the highest, vehicles of malicious scandal and libel of any member of the bar. Upon any other principle for the government of the bar, it would be impossible to conduct business with decorum and with due regard to the orderly proprieties of a court of justice. To tolerate such a precedent as this case would make, would subject any attorney, in the performance of his duty, and upon any unfounded pretense supposed to be available to his adversary, to the most unjust and outrageous imputations upon his character and conduct. The bar are entitled to be protected against such abuse of privilege by any of its brother members. Indeed, the power of disbarment, as a means of protection, would be of little practical use, if it were not applicable to such cases."

In the instant situation, petitioner's ABA charges against the respondents (R. 16-19) are far more serious than those in the Adrisans Case, and further these defendants have admitted in their answer to plaintiff's Motion Under Rule 34 that they cannot support their irrelevant, impertinent retaliation. It necessarily follows that the decisions of the court below should be reversed.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner

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Pittsburgh 19, Pa.

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11595 September Term, 1956,
September Session, 1956

PAUL GINSBURG,
Plaintiff-Appellant,
v.
JOHN D. BLACK, ET AL.,[1]
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

November 1, 1956

Before MAJOR, FINNEGAN and SCHNACKENBERG,
Circuit Judges.

Opinion.

SCHNACKENBERG, *Circuit Judge.* From the district court's summary judgment in favor of defendants entered in plaintiff's action to recover damages for libel, plaintiff appeals.

All of the parties to this suit are lawyers. Plaintiff and defendants are members of the American Bar Association, a voluntary association.

The complaint charges, *inter alia*:

"8th. On or about June 15, 1953, defendants did, by themselves, their attorneys, agents, servants

[1] In addition to Black, the following were sued: John C. Slade, Guy Allen Gladson, Edward G. Ince, Bryce L. Hamilton, Reuben A. Borsch, Douglas C. Moir, James D. Head, Gerard E. Grashorn, George W. Ott, Grier D. Patterson, Walter A. Wade, Paul H. Moore, Charles J. Calderini, George B. Christensen, Thomas I. Underwood, Thomas A. Reynolds, Frank B. Gilmer, Robert McDougal, Jr., Albert W. Potts and William C. Mulligan.

and employees, cause to be filed and published at Illinois, Kentucky, New York, Vermont, Tennessee, Utah, Colorado, Pennsylvania, Massachusetts and at other places throughout the United States, a 'memorandum' in opposition to appeal of plaintiff from the refusal of the Committee on Professional Ethics of the American Bar Association to entertain a complaint filed before the said Committee by plaintiff, in which said publication, widely publicized as aforesaid and particularly throughout the legal profession, defendants did maliciously, unjustifiably and falsely print and distribute the following defamatory matter concerning the plaintiff:"[2]

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[2] The alleged defamatory matter evidently refers to some prior court actions and is detailed in the complaint as follows:

"At page 11 of the said publication—

'The petition was made up of truths, half truths and plain falsehoods of the type usually filed by persons only interested in making trouble in the hope of personal gain.'

"At page 12 thereof—

'* * * after demonstrating the outrageous, unwarranted character of Ginsburg's petition we said: "Under such circumstances, the attempt of this interloper to get himself into a position where he might hope to be bought off should not be assisted by any Court." '

"At page 13—

'There can be no possible question that he was an "interloper" meddling with a matter in which he had no slightest interest, * * *'

"At page 15—

'This is not the only time Ginsburg has tried desperately to inject himself into litigation conducted by able lawyers, * * *'

"At page 16—

'This litigation terminated with an injunctive order issued by Judge John J. Kennedy against both Ginsburgs * * *.'"

"9th. On or about July 15, 1953, defendants did file and publish at the places and before the Committee and Association as aforesaid, a document entitled 'Response to Motion to Strike Memoranda and to Delete and Suppress Certain Matter', which said Document contained the following defamatory matters concerning plaintiff:"[3]

The complaint charges that these publications were false, malicious and published with intent and purpose of injuring him in his professional reputation and standing.

By their answer, defendants, as to the matters set forth in paragraphs 8th and 9th of the complaint, although admitting the filings alleged, deny that they or

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[3] "At page 2, the following—

'• • • when he thinks his own best interests are served, he does not consider himself bound by any record, or even by any opinion or judgment of a court.'

"At page 3—

'• • • Ginsburg appears to believe that that litigation was legitimate and not discreditable to him, but the fact remains that no amount of chlorophyll could destroy the malodorous character of Ginsburg's performance therein.'

"At page 4—

'Ginsburg's response (entirely outside any record)—Appendix A—is that the lawyers directly involved in the case handled it badly, failed to introduce some important paper, and that now the time is ripe for him to make another attempt to intervene or start new litigation.'

"At page 5—

'The fact remains that all of that libel litigation was unsuccessful and discreditable to Ginsburg, and the Court of Common Pleas of Allegheny County, Pennsylvania, did enjoin Ginsburg from commencing any more such suits.' "

their attorneys, agents, servants or employees published, within the meaning of the law of libel, any memorandum or document whatsoever.

By amendment to their answer, defendants stated that

"* * * on April 15, 1953 these defendants * * * received notice from the Committee on Hearings of the American Bar Association of the complaint plaintiff had lodged against defendants and of his appeal of the ruling of the Committee on Ethics and Grievances of the American Bar Association. Said notice contained the following information:

'The Committee on Hearings will dispose of this appeal in substantially this manner:

'1. Let the appellant supply to its Chairman by 15 May 1953 sixty (60) mimeographed or printed records of:

a. Complaint in each case to the A.B.A. Professional Ethics Committee;

b. Copy of letter from the Chairman of the Professional Ethics Committee to the complainant of 20 October 1952;

c. All (not part) of the balance of the correspondence between the complainant and the Chairman of the Committee on Professional Ethics if the complainant elects so to do;

d. Such arguments and citations of authorities as the appellant may desire.

'2. The Chairman will distribute such memoranda to each of the members of the Committee on

Hearings, to the members of the Committee on Professional Ethics and to each of the persons, twenty-nine (29) members of the Association, complained against.

'3. The respondents, individually, collectively, or by such groups as they may elect, by 15 June 1953 may supply sixty (60) copies of any answer and supporting material they desire, either printed or mimeographed.

'4. The Professional Ethics Committee may supply by 15 July 1953 sixty (60) copies, either mimeographed or printed, of any material it desires in reply to any of the above.

'5. The Chairman will distribute to the complainant, the respondents and the members of the Committee on Professional Ethics one (1) copy each of the foregoing. * * *' "

In answer thereto, plaintiff admitted that defendants received said notice.

Defendants thereafter made a motion for summary judgment in their favor, which was granted by the district court. Plaintiff's appeal followed.

We shall affirm the judgment below. We base our action upon grounds different from those relied upon by the district court. This we have a right to do. *Kithcart v. Metropolitan Life Ins. Co.*, 150 F. 2d 997, 1000; *Securities Comm'n v. Chenery Corp.*, 318 U.S. 80, 88.

In this court, plaintiff, arguing orally pro se, stated substantially as follows: defendants caused to be pre-

pared a memorandum in opposition to the appeal of plaintiff before the Committee on Hearings, together with a number of copies thereof, and filed same with the chairman of that committee; that, in accordance with the rules of procedure of the American Bar Association, these copies were sent out by the committee chairman to each of the members, who were in the states where the publication allegedly occurred.

An essential ingredient of any definition of "libel" is a publication by the author or by his authority, 53 C.J.S. 232. The uncontroverted facts in this record reveal the absence from plaintiff's case of this ingredient.

Plaintiff, in attempting to charge defendants with a publication, alleges that they, by themselves, their attorneys, agents, servants, and employees, caused to be filed and published at [sic] Illinois, Kentucky, New York, Vermont, Tennessee, Utah, Colorado, Pennsylvania, Massachusetts and at other places throughout the United States, the alleged libelous writing, "in which said publication, widely publicized as aforesaid and particularly throughout the legal profession, defendants did print and distribute the alleged defamatory matter". It is clear that the word "filed" relates only to the lodging of alleged defamatory matter with someone. That person is not specifically identified by the complaint. However, plaintiff's statement to this court during oral argument has made it clear that the filing was with the chairman of the Committee on Hearings of the American Bar Association. This filing necessarily occurred at one place and, therefore, the language "at Illinois, Kentucky" etc. could not refer to the filing and must refer

only to the word "published" immediately preceding that language. The subsequent language of the 8th paragraph, charging that defendants did *print and distribute* the alleged defamatory matter, necessarily uses those verbs to describe the means of publication immediately theretofore referred to. The question then arises as to whether plaintiff has charged a publication by the defendants. Having distinctly charged that defendants "by themselves, their attorneys, agents, servants and employees" (whom we shall, for brevity, sometimes herein refer to as "their agents") "did cause to be filed" (with the committee chairman), plaintiff now contends that defendants are liable to plaintiff on the ground that they or their agents published the alleged libelous matter in the various states mentioned.

Plaintiff does not contend that the mere filing of the memorandum with the chairman of the committee constituted a publication of its contents. He has cited no case so holding as a matter of law. There is no showing that, as a matter of fact, documents filed with a committee chairman of the bar association are records which may be read by any persons other than those designated to receive the documents through the sole means provided by the rules of the association, *i.e.*, distribution by the chairman.

The method of actual publication of the alleged libelous matter is not in dispute. Publication was accomplished by the chairman of the Committee on Hearings of the American Bar Association and was a part of the processes of that association to which plaintiff had resorted when he filed a complaint and later appealed from

the unfavorable action of a committee thereon.[4] Moreover, quite aside from the association's rules, defendants cannot be held liable on the theory that the committee chairman was their agent in distributing the filed, printed copies of the memorandum to the members of the committee, including himself. Such agency is negated by the undisputed facts that the chairman was not under the control or direction of the defendants, he was not paid by them, he was not hired by them, they had no right to discharge him, and he did not purport to act for defendants. He was acting only as an agent of the bar association. It might, however, be logically contended that, if he was also acting as agent for anyone other than the bar association, in whose behalf he purported to act, that other person was the plaintiff, who voluntarily approved in advance the authorized method of distribution by the chairman when he invoked the established machinery of the bar association to procure discipline of defendants.

In fact, by his adoption in advance of this method of distribution by the chairman, which plaintiff claims constituted publication in various states, plaintiff caused, consented to and authorized such publication, and, there-

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[4] On or about October 20, 1952, the chairman of the Committee on Professional Ethics advised plaintiff that with the exception of one member of the committee who felt that he was disqualified to sit in the matter, "the other members of this committee are all agreed that we should not entertain your complaint. The same public policy that required a dismissal of your libel action by the Circuit Court of Appeals because the statements were 'vital, material and pertinent to the issue raised' also leads to a dismissal of the charge before the committee that the statements complained of were a violation of Canon 17."

The Court of Appeals decision is *Ginsburg v. Black*, 192 F. 2d, 823.

fore, for that additional reason he cannot recover for any injuries sustained thereby, 53 C.J.S. 129.

Moreover, there is no allegation that any member of the committee, including the chairman himself, ever read the contents of the memorandum priod to distribution, which was made, not by the defendants or any of their agents, but by the chairman himself. The purport of the rules of procedure indicates that the chairman had no occasion to examine the contents of the memorandum until this distribution was made and he, like the other committee members, was required to prepare himself for a consideration on the subject matter thereof when plaintiff filed a motion to strike.

What we have said in regard to paragraph 8th of the complaint is also applicable to paragraph 9th thereof, *supra*, which incorporates by reference the allegations of paragraph 8th in regard to filing and publishing, insofar as they pertain to defendants' response to plaintiff's motion to strike the memorandum, etc.

For the reasons herein set forth, the judgment of the district court is affirmed.

JUDGMENT AFFIRMED.

FINNEGAN, *Circuit Judge.* I concur in the result reached.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PAUL GINSBURG, Appellant
v.
HORACE STERN ET AL. } No. 11,499

Present: MARIS, GOODRICH and STALEY, *Circuit Judges*

Order.

Upon consideration of the motion and supporting memorandum filed by the appellees to limit the contents of the printed record and to impound certain original papers in the above entitled case, and of the appellant's answer thereto.

It is ORDERED that either of the parties shall print in his or their brief or in any appendix thereto or otherwise either (1) the exhibit to the complaint or any of its contents, except a statement to the effect that the said exhibit is a petition addressed to the Supreme Court of Pennsylvania under Rule 17 (d) of said court seeking disciplinary action against a judge of the Court of Common Pleas of Allegheny County, the fifteen members of the Committee on Offenses of the latter court and four individual members of the bar of said court, (2) the brief of the plaintiff in the court below which is listed as Document No. 18 on the record, or (3) any portion of either of said documents. The parties may however, in their briefs or in oral argument request the

court to examine the said documents in its files and upon such request the court will do so, the rule requiring such matters to be included in the appellant's appendix for the use of the Judges being expressly waived in this case.

It is further ORDERED that said brief and said exhibit to the complaint, together with any other papers hereafter filed in this proceeding which disclose the scandalous matter in said exhibit and brief, shall be impounded by the clerk and made available for inspection only upon the order of this Court.

BY THE COURT,

MARIS
Circuit Judge

January 4, 1955.

Office - Supreme Court, U.S.
FILED
MAR 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 788

PAUL GINSBURG,

Petitioner,

vs.

JOHN D. BLACK, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE B. CHRISTENSEN,
Pro Se and as Attorney for the Other Respondents,

THOMAS A. REYNOLDS,
Pro Se and as Attorney for the Other Respondents,

R. LAWRENCE STORMS,
Attorney for Respondents.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago, Illinois,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956.

No. 788.

PAUL GINSBURG,

Petitioner,

vs.

JOHN D. BLACK, ET AL.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Respondents, who are Chicago lawyers, respectfully request that the Petition for a Writ of Certiorari be denied because it presents no question of general importance. On the contrary, it presents only the views of petitioner (a Pittsburgh lawyer who is a chronic plaintiff against members of the bench and bar)[1] as to a question of local libel law, which question was decided correctly below. Moreover, contrary to the asseverations of the petition, respondents never admitted that they issued anything false or "unprovable" concerning petitioner and denied publication within the meaning of the law of libel (R. 8, 12).

1. For examples of petitioner's predilection for suing judges and lawyers apart from the instances referred to in the body of this brief, see *Ginsburg v. Stern*, 125 F. Supp. 595, 227 F. 2d 245, in which he sued the Chief Justice of the Pennsylvania Supreme Court, a court prothonotary, fifteen members of the Committee on Grievances of that court, and sundry other lawyers. See also *Ginsburg v. Banks*, 329 U. S. 450, which while not directly against judges and in which he unsuccessfully sought relief from this Court against a Pennsylvania injunction prohibiting him from instituting certain further libel proceedings, was of the same general nature.

STATEMENT.

Petitioner in this action accused respondents of libeling him in the course of defending themselves in professional disciplinary proceedings brought against them by petitioner before the American Bar Association. Respondents believed there were several defenses to the instant action and asserted them before the District Court, which entered summary judgment in their favor on the ground of privilege (R. 111). On appeal two members of the Seventh Court of Appeals affirmed the judgment on the ground of no publication; one member concurred in affirmance without a statement of reasons (Pet. p. 23).

The genesis of the instant action was in litigation in the State of Kentucky in 1950 (*Robertson, et al.* v. *Hert's Adm'x, et al.*, 312 Ky. 405, 227 S. W. 2d 899) in which the law firm of which respondents and others were members represented certain clients who originally had come from Chicago. Petitioner sought to intervene in that litigation as an alleged *amicus curiae*. Most of the parties thereto resisted the proposed intervention and it was denied by the Kentucky court. The brief filed by respondents' firm in the Kentucky case argued that Ginsburg was an "interloper" seeking "to get himself into a position where he might hope to be bought off." Other counsel took substantially the same position.

After the Kentucky decision, petitioner instituted three separate libel suits against lawyers or parties who had opposed him and alleged that they had libeled him by their "interloper" argument against his attempted intervention. He lost all three libel suits: He unsuccessfully sued certain Kentucky lawyers and others in the District Court of the Western District of Kentucky and lost an appeal to the Court of Appeals for the Sixth Circuit (*Ginsburg* v. *Citizens Fidelity Bank, et al.*, 194 F. 2d 888). In Chi-

cago he sued respondents (and others) in the District Court for the Northern District of Illinois; his complaint was stricken; he appealed to the Court of Appeals for the Seventh Circuit, where he again lost. He then unsuccessfully sought certiorari from this Court (*Ginsburg* v. *Black, et al.*, 192 F. 2d 823, 343 U. S. 934). He filed a similar suit in Chicago against The First National Bank of Chicago and Alfred L. Kuehn, which had a history similar to that of the suit against respondents (*Ginsburg* v. *First National Bank, et al.*, 192 F. 2d 826, 343 U. S. 934).

After losing the aforesaid libel litigation, petitioner sought to have the American Bar Association discipline respondents (and the Kentucky lawyers whom he had sued unsuccessfully) for alleged misconduct in the Kentucky suit. Respondents defended against the Bar Association proceeding. After full hearings, the Association refused to take action upon petitioner's charges. Thereupon he instituted the instant action, alleging that respondents had again libeled him in defense documents before the Bar Association because (in substance) they had repeated the statement previously made in the Kentucky suit and had referred to other actions in which he had attempted to intervene or had sought to sue for libel.

CONCLUSION.

We believe it is apparent from the face of the petition that this case does not meet the tests regularly applied in determining whether the writ of certiorari shall issue. The questions presented are purely local questions as to the law of libel and even if incorrectly decided would not furnish ground for certiorari. But the case was decided correctly. Like many cases that are inherently fallacious, there were several defects in it (R. 12). Aside from technical matters, we point out that what was said about

petitioner in the Bar Association proceedings was incontrovertibly true because it was all based upon court decisions in which Ginsburg was severely criticized and was pertinent to the issue petitioner had raised because under the Association's rules for disciplinary proceedings it takes "into consideration the past professional conduct of both the respondent and the complainant" (R. 39). We bear Mr. Ginsburg no malice; however, when he sues us or seeks discipline against us, we have no option but to point out his record as he has made it.

It is respectfully requested that the writ of certiorari be denied.

Respectfully submitted,

GEORGE B. CHRISTENSEN,
Pro Se and as Attorney for the Other Respondents,

THOMAS A. REVELLE,
Pro Se and as Attorney for the Other Respondents,

R. LAWRENCE STORRS,
Attorney for Respondents.

WINSTON, STRAWN, SMITH & PATTERSON,
38 South Dearborn Street,
Chicago, Illinois,
Of Counsel.

March 7, 1957.

In The

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 738

PAUL GINSBURG, Petitioner,

v.

JOHN D. BLACK, JOHN C. SLADE, GUY ALLEN GLADDON, EDWARD G. INCE, BRYCE L. HAMILTON, REUBEN A. BORSCH, DOUGLAS C. MOIR, JAMES D. HEAD, GERARD R. GRABHORN, GEORGE W. OTT, GRIER D. PATTERSON, WALTER A. WADE, PAUL H. MOORE, CHARLES J. CALDERINI, GEORGE B. CHRISTENSEN, THOMAS J. UNDERWOOD, THOMAS A. REYNOLDS, FRANK B. GILMER, ROBERT McDOUGAL, JR., ALBERT W. POTTS and WILLIAM C. MULLIGAN, Respondents.

PETITIONER'S REPLY BRIEF

In their Brief in Opposition, the respondents have continued their repeated distortions of facts and of applicable laws through which distortions they have in the past succeeded in improperly influencing decisions in courts and in the American Bar Association, resulting in unlawful detriment to the petitioner. They still argue that their defamatory publications are true, after they have admitted in their Answer to Motion under Rule 34 that they have no proof, and when the Record shows that there has never been a hearing to establish truth or falsity. Actually truth is not in issue herein because where the doctrine of absolute privilege is invoked, the issues of truth and malice are not considered, and the respondents themselves successfully so argued in the former libel actions. Therefore, since they are evidently

aware of the law, it must be concluded that their voluntary insertion of such impertinent arguments is merely for the purpose of repeating defamation falsely and maliciously in order to prejudice this Honorable Court's consideration of the petition.

In the footnote to the introductory paragraph of their brief the respondents impertinently referred to the cases of *Ginsburg v. Stern, et al.*, and *Ginsburg v. Sachs, et al.* The terse references were designed to ridicule unjustly your petitioner in the eyes of this Honorable Court, but the truth about those two cases should, on the contrary, win for your petitioner from this Honorable Court nothing but praise and favorable consideration. For instance, in the case of *Paul Ginsburg v. Horace Stern, et al.*, individually and jointly as Justices of the Supreme Court of Pennsylvania, the Honorable Wallace S. Gourley, Chief District Judge of the United States District Court for the Western District of Pennsylvania, stated in the said proceedings, "I will put it as expressing my opinion that said action and procedure that followed was contrary to established rules and custom and was violative of basic concepts of justice". Chief Judge Gourley was referring to a secret, off-the-record order prohibiting a certain petition presented by your petitioner from being numbered, docketed and filed in the Pennsylvania Supreme Court, said "order" having been issued by Hon. Horace Stern who at the time was Chief Justice of Pennsylvania. Incidentally, the principal respondent in that petition was one of the Honorable Horace Stern's best friends. The respondents herein failed in their duty to this Honorable Court by not stating that the said action is still pending and undetermined; that Chief Judge Gourley entered an opinion

that the Amended Complaint states a cause of action upon which relief can be granted, but dismissed it solely on the ground of judicial immunity. That action is on appeal at No. 12,052 in the Court of Appeals for the Third Circuit, which court rendered an opinion in 1945 in the case of *Picking v. Pennsylvania Railroad Company, et al.*, 151 F.2d 240, through Chief Judge Biggs on the point of lack of judicial immunity from suits under the Civil Rights Statutes (p. 250), that "The Statute must be deemed to include members of the state judiciary acting in official capacity" and "The result is of fateful portent to the judiciary of the several states". The decision in the *Picking* case has in effect been upheld by this Honorable Court in *Tenney v. Brandhove*, 341 U.S. 367, 97 L. Ed. 1019 (1951), which involved privilege of state legislators in intra-legislative acts, and was expressly intended to apply only to that particular fact situation. Mr. Justice Black, concurring (pp. 379-81), made an observation which is sound argument here in opposition to the respondents' impertinence: "... it does not seem inappropriate to point out that the right of every person in this country to have his say, however unorthodox or unpopular he or his opinions may be, is guaranteed by the same Constitutional amendment that protects the free press". Furthermore, Mr. Justice Douglas, dissenting (pp. 381-3), held that, "No other public official has complete immunity for his actions"; and "when a committee perverts its power, brings down on an individual the whole weight of government for an illegal or corrupt purpose, the reason for the immunity ends"; and "I see no reason why any officer of government should be higher than the Constitution from which all rights and privileges of an office obtain".

Your petitioner is and has for many years been a member in good standing of The Allegheny County, Pennsylvania State and American Bar Associations, and is a past officer of his local bar association; and never has there been a single complaint filed against him. Nevertheless, he has been repeatedly subjected to the worst, most damaging abuse at the hands of these respondents which can be heaped upon a member of the bar; and they claim, with straight face, that he cannot have any redress whatever, and that if he even seeks redress, they can heap upon him more of the same *ad infinitum*, without fear of court judgment or bar association discipline. The respondents' repeated violations of petitioner's rights as guaranteed by the Constitution and laws of the United States and their reckless disregard of the Canons of Professional Ethics in so doing, as evidenced herein, make it plain that the one thing which appears to be constitutional with them in respect to your petitioner is their violations and breaches.

The footnoted case of *Sachs, et al., v. Phillip Ginsburg* was a suit in equity brought by three criminal defendants, who transformed themselves into plaintiffs, to enjoin *Phillip* Ginsburg, his agents, counsellors and attorneys (including *your* petitioner) from instituting criminal prosecutions against them for libel and conspiracy; and they succeeded in procuring the Injunction Decree. It is hornbook law and common knowledge among those learned in the law that a court of equity does not have jurisdiction even to entertain such an action, primarily because such plaintiffs have an adequate remedy at law in defending themselves in criminal court where they belong. Important support for the proposition that the said Injunction Decree is

patently illegal, may be found in the fact that it is the only such decree ever entered in Pennsylvania, or England. Yet these respondents have stooped to continue their repeated distortions of the implications of that decree in order to misrepresent "the past professional conduct of both the respondents and the complainant". Instead of trying to make capital out of such disgraceful judicial misconduct, all members of the bar should, and many have joined in the adverse criticism of that patently illegal decree. But the record herein makes it quite evident that such professional conduct is far above and beyond these respondents.

In the introductory paragraph of their brief, the respondents have seen fit to attempt to dilute their record admission of publication by denying "publication within the meaning of the law of libel". Nevertheless they cannot *nunc pro tunc* deny publication as set forth in the petition and Record, any more than they can deny *nunc pro tunc* the admissions contained in their Answer to Motion Under Rule 34, wherein they admitted that they have no proof of any illegal or unprofessional conduct on the part of your petitioner. Yet these denials of record facts appear with regularity at various stages tailor-made to suit their current exigencies; and they make them with "righteous" indignation. In the same paragraph they have portrayed themselves as "pots" trying to make a "kettle" out of a gentleman, an insurmountable burden. But what is even more serious, they made the grave blunder of ridiculing this Honorable Court in their plea for denial of the petition; because they stated "it presents only the views of petitioner" whom they defensively and offensively labeled as a "chronic" plaintiff, whereas actually the petitioner presents the views of this

Honorable Court, and also applicable views of other able and outstanding jurists. Naturally none of the views presented is petitioner's, but necessarily the views of the judges who are the source of the views. Of course, the respondents have generously given credit for these important views to your petitioner for the time being, because these legal views conflict with and reject the personal views of the inferior courts which are herein to be reviewed, and if they succeed in forcing this "gift" upon your petitioner against his will, the legal views may again be ignored simply for being petitioner's. You may be certain that, like Indian-givers, the respondents will retract this "gift" promptly upon the final determination of this matter. The truth is that the respondents are the ones who have presented their own views, and conversely no court would accept them as a gift without fear of impeachment. The respondents have not cited a single case in opposition to the petition, and that is because there is not one. Short briefs are as preferable as they are unusual. Some are short because of conciseness. Respondents' brief is short because of complete lack of authorities. This is so obvious, that they would have been far better off by omitting their brief.

Furthermore, the respondents have insulted the intelligence of this Honorable Court by trying to convince it that the petition presents only "a question of local libel law" and "no question of general importance"; when it is so obvious that the opposite is true, supported by Rules 11, 12, 34 and 56 of the federal Rules of Civil Procedure, the Fifth and Fourteenth Amendments to the United States Constitution, and numerous federal decisions thereunder including decisions of this Court. Respondents' brief in opposition fails to comply with

paragraph 1 of Rule 24 in that it does not disclose "any matter or ground why the cause should not be reviewed by this court"; while the petition does comply with Rule 19 in setting forth the Reasons for Granting the Writ.

In respondents' brief their Statement principally consists of an impertinent and irrelevant review of petitioner's prior libel actions, all of which were dismissed contrarily to the weight of authority through misapplication of the doctrine of absolute privilege. The respondents boast of these successes as though to convince this Court that it should make it unanimous and for no good reason at all. However, there is a tremendous difference between those prior actions and the instant one which positively blocks such unanimity and compels a complete ignoring of the former decisions. The compelling, important difference is that the libelous matters complained of herein were published in the course of disciplinary proceedings against John D. Black, et al., in the American Bar Association, a voluntary association, and not in court pleadings as in the prior actions. Thus the doctrine of absolute privilege is absolutely inapplicable and non-existent herein. Therefore, these respondents come into Court with a wink instead of clean hands and ask for a favor instead of a right. They seem to be notifying this Court that they can get any relief whatever simply for the asking in the Chicago courts where they live and practice, and requesting this Court kindly to do likewise by putting its stamp of approval on the Court of Appeal's decision which conflicts with applicable decisions of this Court; and also upon the Court of Appeal's departure from the accepted and usual course of judicial proceedings, and its sanctioning of such departure by the district court, all of which

actually calls for an exercise of this Court's power of supervision rather than its stamp of approval.

One of the misstatements in respondents' Statement which is not only impertinent and irrelevant but also requires prompt correction is, "After full hearings, the Association refused to take action upon petitioner's charges". There never was any Hearing. The record shows that the ABA Committee on Professional Ethics and Grievances refused to entertain the Complaint without even requiring an Answer; and that on appeal before the ABA Committee on Hearings there still was not a Hearing but merely an oral argument on the record therein.

To respondents, even the constitutional guaranties to individual citizens seem to fall into a somewhat archaic classification of mere "asseverations".

Respectfully submitted,

PAUL GINSBURG
Counsel for Petitioner

Carlton House,
550 Grant Street
Pittsburgh 19, Pa.

11 March, 1957.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

NO. 783

PAUL GINSBURG, Petitioner,

v.

JOHN D. BLACK, JOHN C. SLADE, GUY ALLEN GLADSON, EDWARD G. INCE, BRYCE L. HAMILTON, REUBEN A. BORSCH, DOUGLAS C. MOIR, JAMES D. HEAD, GERARD R. GRASHORN, GEORGE W. OTT, GRIER D. PATTERSON, WALTER A. WADE, PAUL H. MOORE, CHARLES J. CALDERINI, GEORGE B. CHRISTENSEN, THOMAS I. UNDERWOOD, THOMAS A. REYNOLDS, FRANK B. GILMER, ROBERT McDOUGAL, JR., ALBERT W. POTTS and WILLIAM C. MULLIGAN, Respondents.

PETITION FOR REHEARING

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Paul Ginsburg respectfully represents:

1. On March 25, 1957, this Honorable Court denied the petition for writ of certiorari in the above entitled case.

2. The said denial has deprived your petitioner not only of important rights which are guaranteed by the Constitution and laws of the United States, particularly the Fifth and Fourteenth Amendments to the Constitution and the Civil Rights Acts; but also of his rights as

a member of the bar aggrieved by the professional misconduct of other members of the bar, which reflects upon and shadows the standing of the bar and profession as a whole, and impairs the standing and usefulness of the profession and of all its members. Because the decisions herein violate the procedural rules and applicable laws heretofore recognized, the instant case, if not reversed, can and will set dangerous precedents to the detriment of members of the bench and bar alike throughout the United States. Therefore, this case is of national importance. In support hereof, your petitioner quotes one of his arguments submitted to the court of appeals, as follows:

> "In the instant situation, plaintiff's ABA charges against the defendants (16-19) are far more serious than those in the Adriaans Case, and further these defendants have admitted in their answer to plaintiff's Motion Under Rule 34 that they cannot support their irrelevant, impertinent retaliation. It necessarily follows that if the decisions of the court below are not reversed, there is no reason why an attorney so inclined, with impunity, could not file an ABA Complaint against Judge Philip L. Sullivan and the defendants herein charging, even falsely, that they are guilty of the worst professional misconduct, and that the defendants improperly influenced the decision below against plaintiff herein by concurrently arranging through defendants' former law partner, being U. S. Attorney Tieken of their District, and others, to get Harold E. Sullivan, Esquire, Judge Sullivan's brother out of his criminal conviction on two counts of income

tax evasion, three years' imprisonment on each count (to run concurrently) and $2,500.00 fine on each count (distorting appeal No. 11111 in this Honorable Court, United States of America, plaintiff-appellee v. Harold E. Sullivan, defendant-appellant). If said *arguendo*, hypothetical respondents should then sue their complainant for libel, assuming that the charges could not be proved, then said complainant-defendant could as defendant in such libel action claim absolute privilege and obtain a dismissal or summary judgment, thus escaping the normal, legal consequences of what could amount to a most vicious and damaging assault upon the integrity of the jurist involved."

3. Furthermore, it is respectfully submitted that said denial conflicts with this Court's declared policy of protecting citizens' civil rights of an individual nature as well as their proprietary rights, which has been manifest in cases involving the right of privacy, the right to protection of reputation, and other personal rights.

4. Therefore, the refusal to review the discriminatory decisions against your petitioner in the courts below will effect undue discrimination against your petitioner herein; and open the door to widespread abuses in the conduct of the bench, the bar, the American Bar Association and all other professional associations. In support hereof, and necessarily in opposition to criticism of the elective system as opposed to the appointive system, your petitioner quotes an argument which he submitted to the Court of Appeals, as follows:

"The plaintiff respectfully submits that in some cases he, as have others, has been a victim of politics on the bench and shysterism at the bar; and that regarding defendants' position which presupposes the impossibility of the existence of either evil, their basic premise is false. Their position is illogical and argument thereon is untenable. There have been numerous movements during the past several years to reform the judiciary of the several states sponsored by the American Bar Association and various state and local bar associations. One of the most prominent advocates of judicial reform to rid the state courts of politics and political decisions is Chief Justice Arthur T. Vanderbilt of New Jersey, who quoted from a Massachusetts Supreme Court jurist as follows: 'There is no certain harm in turning a politician into a judge. He may be or become a good judge. The curse of the elective system is the converse, that it turns almost every judge into a politician.' Furthermore, Attorney John Ben Shepperd, of Texas, who as President of the National Association of Attorneys-General, told the American Bar Association during its Annual Convention last month in Dallas, that a poll which he sponsored indicated that the legal profession is at the bottom of the list of all American professions in prestige and in contributions to society. Mr. Shepperd said that the country needs young lawyers who would rather be right than rich, who would rather be fair than famous, who would rather be honest than exalted, and who would rather be good lawyers than clever lawyers."

5. Your petitioner herein, in addition to his other compelling reasons for granting the writ, relies heavily upon this Honorable Court's exercise of its power of supervision pursuant to paragraph 1(b) of Rule 19. After all, the district court applied the doctrine of absolute privilege to defamatory matter which was libelous *per se* as to a member of the bar and which was contained not in court pleadings but in proceedings before the American Bar Association, a voluntary association; and then, based thereon, granted a motion for Summary Judgment which was utterly repugnant to Rule 56 of the federal Rules of Civil Procedure. Furthermore, in view of the argument quoted in paragraph 2 hereinabove, it is respectfully submitted that District Judge Philip L. Sullivan did so under highly suspicious circumstances. The court of appeal's affirmance of the summary judgment was quite as judicially obnoxious as the departure from the accepted and usual course of judicial proceedings which it sanctioned, in that, *inter alia*, it was based upon a holding that the defendants did not publish the libels which they admitted they published (See petition). In the court of appeals too there were suspicious circumstances in that the personal Opinion therein in the instant case was written by the same Circuit Judge Schnackenberg who wrote the majority personal Opinion (2-1) in the 7 CCA appeal at No. 11,111 October Term, 1954, on June 15, 1955, in the case of United States of America, Plaintiff-Appellee v. Harold E. Sullivan, Defendant-Appellant, which decision sprung Judge Sullivan's brother. Your petitioner wonders how far district and circuit courts can depart from the accepted and usual course of judicial proceedings without arousing this Honorable Court's power of supervision.

6. If this Court sanctions the misapplication of the doctrine of absolute privilege to libelous matter published in voluntary associations as herein, then the application of the doctrine can readily be extended to apply to other publications such as coast-to-coast broadcasts in scandal magazines like Confidential and Exposed, which, without absolute privilege, have already run hog-wild to such an extent as to arouse the indignation of Church groups and Civic organizations throughout the United States.

7. In opposition to the misconception that it can't happen here and soon, as well as in support hereof, your petitioner would argue that failure to reverse the decisions below could adversely affect even the Chief Justice and the Associate Justices of the Supreme Court of the United States and their dear ones, and particularly in view of the averments of the immediately preceding paragraph.

Wherefore, your petitioner prays that this Honorable Court grant a rehearing.

PAUL GINSBURG,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay. I further certify that it is restricted to the grounds specified in paragraph 2 of Rule 58. I also certify that the foregoing is brought to this Honorable Court's attention pursuant to paragraph 1(b) of Rule 19 calling for an exercise of this Court's power of supervision over the court of appeals.

PAUL GINSBURG,
Counsel for Petitioner.